

NO. 50273-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GEORGE NERVIK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Leroy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's decision to exclude relevant defense evidence was manifestly unreasonable and based on untenable grounds.

2. By excluding evidence relevant to appellant's theory of self defense, the court violated appellant's constitutional right to present a defense and denied appellant a fair trial.

3. Trial counsel's failure to except to the court's omission of a "no duty to retreat" instruction and to the prosecutor's misstatement of the law denied appellant effective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was charged with assaulting his girlfriend's son with a knife. He denied having a knife but admitted grabbing the youth by the collar after the boy fired a paper clip at him using a rubber band. Appellant sought to admit evidence that he was aware of specific incidents in which the youth defied authority figures, to support his defense that he reasonably believed he needed to grab the boy to prevent further attack. The court excluded this evidence, believing appellant could not reasonably fear injury from a rubber band-launched paper clip. Did the court's exclusion of relevant defense evidence based on this manifestly unreasonable belief violate appellant's constitutional right to present a defense?

2. The court instructed the jury on lawful use of force but did not give defense counsel's proposed "no duty to retreat" instruction. Counsel did not object to the court's omission, nor to the prosecutor's suggestion in cross

examination and closing argument that it was unreasonable for appellant to use force rather than flee. The jury was not convinced that appellant assaulted the youth with a knife and convicted him of only fourth degree assault. Where there is a reasonable likelihood the jury believed appellant's version of events but determined self defense was not available because flight was a reasonable alternative to use of force, did counsel's deficient performance deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On February 7, 2001, the King County Prosecuting Attorney charged George Nervik, appellant herein, with second degree assault. CP 1; RCW 9A.36.021(1)(c). The information was amended to add a charge of fourth degree assault. CP 8-9; RCW 9A.36.041. After a jury trial before the Honorable Leroy McCullough, the jury found Nervik guilty of the lesser included offense of fourth degree assault on Count I and entered no verdict on Count II. CP 58-60. The court imposed a deferred sentence, and Nervik filed this timely appeal. CP 69, 72.

2. Substantive Facts

George Nervik was charged with assaulting William Gillespie, his girlfriend's 14 year old son, with a knife. Nervik admitted grabbing William by the collar after the youth shot him with a paper clip from a rubber band, but he denied threatening William with a knife. 6RP¹ 80, 86. The jury was not persuaded that Nervik used a knife, but instead found him guilty of the lesser crime of fourth degree assault. CP 58-60.

At trial, the jury was presented with background information about the relationship between Nervik and William, to help them understand how the charged incident occurred. Nervik and William's mother, Cathy Gillespie, are real estate appraisers, and they met through a professional organization in 1995. They became business partners and then began dating in 1999. 6RP 43-44. Nervik and William got along well initially. Nervik knew the boy lacked a positive male role model, and he tried to be a father figure. He cultivated the relationship by focusing on their shared interests, and William seemed to respond well. 6RP 45-46. When Nervik and Cathy Gillespie began having disagreements in the summer of 2000, however, William began a series of vengeful acts against Nervik, damaging their relationship permanently.

In July 2000, Nervik and Gillespie stopped seeing each other socially for a few weeks, although they remained business partners and thus had

¹ The Verbatim Report of Proceedings is contained in eight volumes, referenced as follows: **1RP** - 1/15/02; **2RP** - 1/16/02; **3RP** - 1/17/02; **4RP** - 1/22/02; **5RP** - 1/23/02; **6RP** - 1/24/02; **7RP** - 1/25/02; **8RP** - 3/22/02.

frequent contact. 6RP 57. William became mad at Nervik for calling his mother, and he decided to retaliate. 5RP 59. Forging his mother's name, William sent several faxes to Nervik telling him not to contact her anymore. 5RP 57-58. Nervik did not believe Gillespie had sent the faxes, and she confirmed his suspicions. When confronted, William admitted sending them. 6RP 58.

Nervik and Gillespie started dating again after the fax incident. In October 2000, they had a disagreement about some business dealings, which turned into a heated argument. 6RP 60-61. William overheard Nervik call his mother some names. He became very angry at Nervik and again decided to retaliate. 5RP 65. That night, he poured syrup into the gas tank of Nervik's car, damaging the fuel system beyond repair. 5RP 66; 6RP 64. Not satisfied with that destruction, William also logged onto Nervik's computer and deleted every business file he could find. 5RP 69-70; 6RP 63.

There was no dispute at trial about William's behavior prior to the charged incident. William admitted striking out at Nervik in retaliation for perceived wrongs, and Nervik testified that the charges against him were the result of William's latest attempt at retaliation.

Nervik explained that on February 3, 2001, he was working on his computer in Gillespie's dining room, while Gillespie worked in her adjacent home office. 6RP 68. Without warning, William began launching paper clips at Nervik with a rubber band. Nervik asked William to stop and, when William did not respond, Nervik asked Gillespie to make him stop. William ignored

both of them and continued firing paper clips at Nervik. When the rubber band flew at Nervik with one of the paper clips, Nervik used it to shoot a paper clip at William, so he would understand that it hurt. William stopped at that point. 6RP 69.

Later that evening, Nervik, Gillespie, and William were eating dinner in the living room when, without warning, William shot another paper clip at Nervik. 6RP 76-77. The paper clip hit Nervik sharply in the chest, and when Nervik jumped out of his seat, his plate, food, and utensils went flying. 6RP 77-78. Nervik picked up a soda can and threw it toward William, hoping to spray him with soda². 6RP 81. Nervik did not know if William had any more paper clips, and he did not want to be hit again, so he stepped over the coffee table, grabbed William by the neck, and told him to knock it off. 6RP 80. Nervik testified that his intent was to make William stop, because the paper clip had hurt. 6RP 83.

After about ten seconds, Nervik released William and sat down. When he asked Gillespie to discipline William, she became upset and asked Nervik to leave. Nervik then began packing up his computer equipment and other belongings and loading them into his truck. 6RP 95-96.

William yelled at Nervik as he was packing, saying he was happy to see Nervik leave. Nervik did his best to ignore William, but when he had finally had enough, Nervik told William he would grow up to be just like his father.

² Count II of the information charged Nervik with fourth degree assault based on his throwing the can. CP 8-9; 2RP 96. Nervik was not convicted of that charge. CP 60.

6RP 97, 99. William's father has a criminal record, and Nervik knew William would consider the comment an insult. 5RP 42; 6RP 112. In response, William called 911 and reported that Nervik had assaulted him with a knife. 5RP 128; 6RP 100.

Despite his history with Nervik, William denied that his accusations were an attempt to retaliate against Nervik for the insult. 5RP 100. He claimed that Nervik was so angry with William for shooting him with the paper clip that he rushed over and poked his steak knife into William's leg. 5RP 34, 37. He also claimed that Nervik had taught him how to launch paper clips and that the two of them had been launching them at each other earlier in the day. 5RP 26.

a. **Exclusion of self defense evidence**

Prior to trial, Nervik informed the court that he planned to argue he acted in self defense. He denied assaulting William with a knife but admitted grabbing William's neck in an attempt to stop William from launching more paper clips. 2RP 96. Nervik planned to establish that the amount of force used was reasonable in light of what he knew about William. Nervik sought to introduce evidence of specific incidents at William's school to show how William reacted when confronted by an authority figure. 2RP 101. Nervik was aware of these incidents, and this knowledge impacted his belief that he needed to grab William in order to make him stop shooting paper clips. 2RP 111, 117-18.

After listening to an offer of proof regarding William's behavior at

school, the court determined that evidence of William's reputation for being confrontational was relevant and admissible. 2RP 123. The court declined to admit specific instances of conduct as circumstantial evidence of Nervik's state of mind, however, because it found Nervik did not have a reasonable apprehension of danger. The court believed no adult could reasonably fear injury resulting from rubber band-launched paper clips. 2RP 124. In light of this belief, the court determined that evidence of William's specific conduct would be more prejudicial than probative. 2RP 125.

Although the court found Nervik did not have a reasonable apprehension of danger, it gave the self defense instruction Nervik proposed. It instructed the jury that force is lawful when used by a person who reasonably believes he is about to be injured and when the force used is not more than necessary. The instruction further told the jury that the amount of force used was to be evaluated in light of all the facts and circumstances known to Nervik at the time of and prior to the incident. CP 55 (Instruction XVIII). As a result of the court's rulings, however, the jury did not learn that Nervik was aware of specific instances in which William defied school authorities. See 6RP 56-57.

b. Ineffective assistance of counsel

Along with the instruction regarding lawful use of force, defense counsel proposed a "no duty to retreat" instruction. CP 34. The court did not instruct the jury on this principle of law, however, nor did counsel except to the court's failure to give the proposed instruction. See 6RP 140-41. Moreover, counsel failed to object when the prosecutor suggested in both cross

examination and closing argument that Nervik had a duty to retreat. On cross exam, the prosecutor asked Nervik, "And you weren't terrified enough of William to leave the house right away, were you?" 6RP 134. Then in closing, the prosecutor argued that, "If [Nervik] was really afraid, why wouldn't he have left the room? Why wouldn't he have called the police if he had just been assaulted with this paper clip? He didn't do any of those things. He went on the offensive." 6RP 159.

The jury rejected the state's theory that Nervik had assaulted William with a knife. But it also failed to find that Nervik's use of force was reasonable under the circumstances, and Nervik was convicted of fourth degree assault.

C. ARGUMENT

1. THE TRIAL COURT'S ERRONEOUS EXCLUSION OF RELEVANT EVIDENCE DENIED NERVIK HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A defendant's right to present evidence in his defense is guaranteed by both the federal and state constitutions. U.S. Const. amend. 6; Const. art 1, § 22 (amend. 10). This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the state's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Although a defendant has no constitutional right to present irrelevant evidence, only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." ER 401.

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). While a trial court has discretion in ruling on evidentiary matters, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

- a. **The court's decision to exclude relevant evidence supporting Nervik's self defense theory was based on untenable grounds.**

A person about to be injured is legally justified in using force to prevent an offense against his person, so long as the force used is not more than necessary. RCW 9A.16.020(3). This statutory definition of self defense includes both subjective and objective components: the subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him, and the objective portion requires the jury to determine what a reasonable person in the defendant's situation would have done. State v. Janes, 121 Wn.2d 220, 238-39, 850 P.2d 495, 22 A.L.R.5th 921 (1993).

Because self defense includes a subjective component, the circumstances known to the defendant at the time of the incident are relevant. Accordingly, Washington cases recognize that the defendant's knowledge of the victim's reputation and past conduct may support a claim of self defense. State v. Walker, 136 Wn.2d 767, 774-76, 966 P.2d 883 (1998); State v. Painter, 27 Wn. App. 708, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981). Although not admissible to establish the victim's character, evidence of the victim's specific prior conduct is admissible for the limited purpose of showing whether the defendant had a reasonable apprehension of danger. State v. Fondren, 41 Wn. App. 17, 25, 701 P.2d 810, review denied, 104 Wn.2d 1015 (1985); State v. Walker, 13 Wn. App. 545, 536 P.2d 657, review denied, 86 Wn.2d 1005 (1975); Comment, ER 404.

In this case, Nervik sought to introduce evidence of specific incidents at William's school in which he refused to comply when confronted by an authority figure. 2RP 101. Nervik was aware of these incidents, and this knowledge impacted his belief that merely telling William to stop shooting paper clips would not suffice; he needed to grab William in order to prevent further attack. 2RP 111, 117-18.

The court recognized the relevance of William's prior conduct in the context of this case, and it held that evidence of William's reputation for being confrontational was admissible through school officials. 2RP 123. The court also recognized that specific instances of conduct may be admitted as circumstantial evidence of the defendant's state of mind when a claim of self defense is raised. 2RP 102. Nonetheless, the court refused to admit evidence of William's specific conduct, because it did not believe under the circumstances of this case that Nervik could reasonably believe he was about to be injured. 2RP 124.

Some evidence of aggressive or threatening behavior or gestures by the victim is typically required to show that the defendant reasonably believed he was in danger. State v. Walker, 40 Wn. App. 658, 663, 700 P.2d 1168, review denied, 104 Wn.2d 1012 (1985). Contrary to the court's conclusion, Nervik met this burden here. He showed that William, a 14-year-old, launched a paper clip at him using a rubber band. Because William had repeatedly done the same thing earlier in the day, Nervik had reason to believe he would continue this attack unless stopped. This evidence of aggressive and dangerous behavior by William was sufficient to raise the issue of Nervik's reasonable apprehension that he would be injured.

It was the court's opinion, however, that no adult could reasonably fear he was in danger of injury from a teenager shooting paper clips at him with a rubber band. 2RP 124. The court's opinion is manifestly unreasonable. While rubber bands and paper clips, in ordinary use, are not designed to cause harm, it is beyond dispute that a rubber band-launched paper clip is capable of breaking skin or destroying eyes. See State v. Coquette, 601 N.W.2d 443, 447 (Minn. App., 1999); Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967)(school principal held liable for failing to supervise a 13-year-old student who seriously injured another student by striking him with a paper clip shot from a rubber band); Horn v. Broadway Garage, 186 Okl. 535, 99 P.2d 150 (1940)(employee sustained total loss of an eye while playing with a rubber band and paper clip); Waldo v. Galveston Etc. Ry. Co., 50 S.W.2d 274 (Tex. App., 1932)(co-employee shot plaintiff with paper clip from rubber band, requiring removal of eyeball).

It is inconceivable that the court failed to recognize that a flying, pointed, metal object could cause not only pain but even serious injury. No reasonable person would have reached the same conclusion, and the court's exclusion of evidence based on this untenable decision was an abuse of discretion.

b. The court's erroneous ruling prejudiced Nervik's defense and requires reversal.

Despite the court's ruling that Nervik could not reasonably fear harm under the circumstances, the court instructed the jury on self defense. CP 55. Because of the court's ruling, however, Nervik was not able to present evidence to establish that defense. The court determined that evidence of William's prior conduct was relevant only to his character. Applying ER 404 and ER 405, the court limited the defense to proof of William's reputation among school officials. Nervik was not permitted to testify that he was aware of William's prior defiant conduct. 6RP 56-57.

It is a well established rule in Washington that a jury must evaluate evidence of self defense from the standpoint of a reasonable person knowing all the defendant knows and seeing all the defendant sees. Walker, 136 Wn.2d at

776; Janes, 121 Wn.2d at 238 (1993); State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984). The subjective component of this test requires the jury to stand, as nearly as possible, in the shoes of the defendant and from that point of view judge the nature of his act. Janes, 121 Wn.2d at 238. Only by considering the defendant's perceptions and the circumstances surrounding the act is the jury able to make the critical determination of whether a reasonably prudent person similarly situated would have believed the defendant's act to be necessary. Janes, 121 Wn.2d at 239. "The subjective aspects ensure that the jury fully understands the totality of the defendant's actions from the defendant's own perspective." Id.

Because of the court's erroneous ruling, Nervik was precluded from informing the jury of the relevant circumstances known to him at the time of the incident. He was not able to show that he knew of specific instances in which William refused to comply with authority figures and continued his aggressive conduct. Because the jury lacked this crucial information, it could not evaluate the situation from Nervik's perspective. Without knowing what Nervik knew about William, the jury could not legitimately decide if a reasonable person would have acted as Nervik did.

The court's erroneous ruling violated Nervik's constitutional right to present his defense. This violation is presumed prejudicial, and the state has the burden of proving the error harmless beyond a reasonable doubt. See Maupin, 128 Wn.2d at 929. The state cannot meet its burden in this case. The state failed to convince the jury that Nervik assaulted William with a knife as William

claimed. Instead, the jury convicted Nervik of fourth degree assault. A juror who fully understood the situation from Nervik's perspective could reasonably have concluded that Nervik's use of force was justified. The court's erroneous exclusion of defense evidence cannot be considered harmless beyond a reasonable doubt, and reversal is required.

2. DEFENSE COUNSEL'S FAILURE TO ENSURE THAT THE JURY WAS INFORMED NERVIK HAD NO DUTY TO RETREAT DENIED NERVIK A FAIR TRIAL.

Under Washington law, a person has no duty to retreat from a place he has a right to be; he may stand his ground and use lawful force to defend himself against attack. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). Accordingly, a defendant is entitled to a "no duty to retreat" jury instruction when the evidence shows that he defended himself against an assault in a place where he had a right to be. State v. Wooten, 87 Wn. App. 821, 825, 945 P.2d 1144 (1997), review denied, 134 Wn.2d 1021 (1998). Such an instruction is necessary where the jury could conclude that flight was a reasonably effective alternative to the use of force. State v. Williams, 81 Wn. App. 738, 742-44, 916 P.2d 445 (1996).

Under the facts of this case, Nervik was entitled to a "no duty to retreat" instruction. He testified that, as he was eating dinner in a house where he was a part-time resident and invited guest, he was assaulted with a rubber band-launched paper clip. In order to prevent further attack, he grabbed his assailant by the neck. Moreover, the prosecutor suggested during cross examination that Nervik could have left the house rather than responding with force. Given this insinuation, it was imperative that the jury be informed Nervik had no duty to retreat.

Defense counsel proposed the necessary instruction, but the court failed to include it in the court's instructions to the jury. CP 34, 35-57. Counsel's failure to except to the court's omission constitutes ineffective assistance of counsel.

Defendants are constitutionally guaranteed reasonably effective representation by counsel. U.S. Const., amend. 6; Wash. Const. art. 1, § 22;

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 6674, 104 S. Ct. 2052 (1984). Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

The first prong of the Strickland test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. Strickland, 466 U.S. at 689.

There is no indication in the record as to why the trial court omitted the proposed "no duty to retreat" instruction. The court never specifically ruled that the instruction was not warranted in this case. Moreover, since the court instructed the jury on self defense, it is possible the omission was merely an oversight on the court's part. Consequently, there is no excuse for counsel's failure to take exception to the omission. Timely exception by counsel would have permitted the court to correct the error and ensure that the jury receive the necessary instructions on the law. See State v. Dent, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). Counsel's failure to do so amounts to deficient performance. See Thomas, 109 Wn.2d at 228 (counsel's failure to propose instruction warranted by evidence, that gives complete statement of law and is helpful to defense, constitutes deficient performance).

Similarly, counsel failed to object when, both in cross examination and closing argument, the prosecutor suggested that Nervik acted unreasonably in defending himself instead of fleeing from the house. 6RP 134, 159. No legitimate trial strategy would justify counsel's failure to object to the prosecutor's misstatement of the law on a matter so crucial to the defense. In fact, a timely objection would have highlighted the need for a "no duty to retreat" instruction. Under the circumstances, counsel's performance must be considered deficient.

The second prong of Strickland requires the defendant to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

First, there is a reasonable probability that the trial court would have given a "no duty to retreat" instruction if counsel had excepted to the omission. As noted above, Nervik was entitled to the instruction, given the evidence in

the case, and the omission was likely inadvertent. Furthermore, it is reasonably likely that the outcome of the case would have been different had the instruction been given.

A similar situation was presented in State v. Wooten. There, the defendant was charged with murder, and she argued she had acted in self defense. The defendant presented evidence that as she was engaged in a fight, her opponent threatened to kill her. The defendant went inside her house and retrieved a gun, thinking she might need it to defend herself. When she went back outside, she saw the other woman reach for what she thought was a gun. The defendant then fired a warning shot, killing the victim. 87 Wn. App. 823-24.

The defendant requested a "no duty to retreat" instruction, but the trial court ruled that such an instruction was not supported by the evidence. 87 Wn. App. at 824. This Court reversed. It held that the proposed instruction was required to allow the defendant to fully argue her theory of self defense. Further, because a reasonable juror could have concluded that flight was a reasonable alternative to the defendant's use of force, the trial court's refusal to give the instruction was not harmless error. Accordingly, this Court reversed the defendant's conviction. Id.

The lack of instruction was prejudicial in this case as well. There was no question that William had shot Nervik with a paper clip. And there was evidence that he had persistently done the same earlier in the day despite being told to stop. Thus, there is a reasonable probability that the jury believed Nervik's testimony that he grabbed William's neck in order to prevent further attack. It is also reasonably likely that the jury nonetheless concluded self defense was unavailable because, as the prosecutor suggested, Nervik could have left the house instead of using force. Counsel's failure to ensure the jury was informed that Nervik had no duty to retreat prejudiced the defense and denied Nervik a fair trial. Reversal is required.

D. CONCLUSION

The court's manifestly unreasonable decision to exclude relevant self defense evidence violated Nervik's right to present a defense and denied him a fair trial, as did counsel's ineffective representation. This Court should reverse Nervik's conviction and remand for a new, fair trial.

DATED this _____ day of February, 2003.
Respectfully submitted,

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